

**A Hongkong & Shanghai Banking Corp v Timor Electric
Cable & Wire Sdn Bhd & Ors**

HIGH COURT (KUCHING) — SUIT NO KG 276 OF 1988

B CHONG SIEW FAI J
20 MAY 1991

Civil Procedure — Costs — Discontinuance of action — Whether each party should bear its own costs — Whether merits of case could be considered — Rules of the High Court 1980 O 21 r 3

- C** The first defendant borrowed a sum of money from the plaintiff whereby the other six defendants were the guarantors. Upon the first defendant's default, the plaintiff sued all seven defendants. The fifth defendant delivered a defence. Soon after, a judgment in default of appearance was entered against the first and seventh defendants. The
- D** plaintiff then applied to strike out the fifth defendant's defence and to enter final judgment and costs ('the first application'). Subsequently the judgment debt and costs awarded were fully settled by the defendants other than the fifth defendant. This action was discontinued as against all the other defendants except the fifth defendant. The fifth
- E** defendant applied to dismiss the plaintiff's action with costs, *inter alia*, for want of prosecution ('the second application'). The plaintiff, however, filed another application for leave to discontinue its action against the fifth defendant and for costs of the application ('the third application'). The plaintiff did not wish to proceed with the first application and would agree to discontinue its action against the fifth
- F** defendant if each party would pay its own costs. The fifth defendant, however, wanted the plaintiff to pay its costs in the event the action was discontinued. In the High Court, the fifth defendant argued firstly that the plaintiff had delayed in effecting service of summons on it. The plaintiff replied that the delay was caused by negotiations for a settlement between the plaintiff and the other defendants. The fifth
- G** defendant also submitted on the merits of its defence to support its application for costs. The fifth defendant lastly submitted that affidavits filed on the plaintiff's behalf which did not expressly refer to the second and third applications should not be considered.
- H** **Held**, striking out the first application and allowing the third application:
- (1) The plaintiff's explanation for the delay in serving the summons on the fifth defendant was reasonable. It was also the usual practice to serve a summons after a date for hearing has been fixed.
- I**
- (2) The merits of the case would not be dealt with for the purpose of deciding the question of costs.
 - (3) The first application would be struck out with no order as to costs.

- (4) Leave was given to the plaintiff for the action to be discontinued and each party was ordered to pay its own costs. A
- (5) The plaintiff's affidavit evidence was considered purely on the question of costs.

[Bahasa Malaysia summary]

Defendan pertama telah meminjam sejumlah wang daripada plaintiff di mana enam defendan yang lain menjadi penggerenti. Pada pengingkar-an defendan pertama, plaintiff mendakwa ketujuh-tujuh defendan. Defendan kelima telah mengemukakan suatu pembelaan. Tidak lama selepas itu, satu penghakiman ingkar kehadiran telah dibuat terhadap defendan pertama dan ketujuh. Plaintiff kemudiannya memohon untuk membatalkan pembelaan defendan kelima dan untuk mencatat penghakiman muktamad dan kos ('permohonan pertama itu'). Berikutnya hutang penghakiman dan kos yang diputuskan telah diselesaikan dengan penuh oleh defendan yang lain daripada defendan kelima. Tindakan ini terhadap semua defendan yang lain kecuali defendan kelima telah diberhentikan. Defendan kelima memohon untuk membuang tindakan plaintiff dengan kos, antara lainnya, kerana ketiadaan pendakwaan ('permohonan kedua itu'). Plaintiff, akan tetapi, memfailkan satu lagi permohonan untuk kebenaran memberhentikan tindakannya terhadap defendan kelima dan untuk kos permohonan itu ('permohonan ketiga itu'). Plaintiff tidak ingin meneruskan permohonan pertama itu dan akan bersetuju untuk memberhentikan tindakannya terhadap defendan kelima jika setiap pihak membayar kos masing-masing. Defendan kelima, akan tetapi, mahukan plaintiff membayar kosnya sendiri sekiranya tindakan itu diberhentikan. Dalam Mahkamah Tinggi, defendan kelima berhujah pada pertamanya bahawa plaintiff telah berlelah dalam melaksanakan penyampaian saman ke atasnya. Plaintiff menjawab bahawa kelengahan itu disebabkan perundingan untuk penyelesaian antara plaintiff dan defendan yang lain. Defendan kelima juga berhujah atas merit pembelaannya menyokong permohonan untuk kos. Defendan kelima akhirnya berhujah bahawa affidavit yang difailkan bagi pihak plaintiff yang tidak dengan ternyata merujuk kepada permohonan kedua dan ketiga itu tidak harus dipertimbangkan.

Diputuskan, membatalkan permohonan pertama itu dan membenarkan permohonan ketiga itu:

- (1) Keterangan plaintiff akan kelengahan dalam menyampaikan saman itu ke atas defendan kelima adalah munasabah. Ia juga adalah perbuatan biasa untuk menyampaikan sesuatu saman selepas tarikh pembicaraan telah ditetapkan. H
- (2) Merit kes ini tidak akan dibicarakan untuk tujuan memutuskan persoalan kos.
- (3) Permohonan pertama itu akan dibatalkan dengan tiada perintah kos. I
- (4) Kebenaran diberikan kepada plaintiff untuk tindakan itu diberhentikan dan setiap pihak diperintahkan membayar kos masing-masing.

- A (5) Keterangan affidavit plaintiff telah dipertimbangkan semata-matanya atas persoalan kos.]

Cases referred to

- B 1 *Lum See On v Chan Kit Yong* [1956] MLJ 40 (distd)
2 *JT Stratford & Son Ltd v Lindley & Ors (No 2)* [1969] 1 WLR 1547; [1969] 3 All ER 1122 (folld)
3 *Computer Machinery Co Ltd v Drescher & Ors* [1983] 3 All ER 153; [1983] 1 WLR 1379 (folld)

Legislation referred to

- C Rules of the High Court 1980 O 21 r 3(1), O 25 r 1(4)
Rules of the Supreme Court 1965 [UK] O 21 r 3(1), O 25 r 1(4)

S Sahathevan (Battenberg & Talma) for the plaintiff.
TO Thomas (Thomas & Co) for the fifth defendant.

- D *Cur Adv Vult*

Chong Siew Fai J: There are three applications by way of summons-in-chambers before me:

- E (1) the plaintiff's application dated 8 June 1989 to strike out the fifth defendant's defence and for judgment to be entered in the sum with interest and costs claimed in the action;
(2) the fifth defendant's application dated 21 March 1990 for dismissal of the plaintiff's action for want of prosecution, or alternatively, as being vexatious or an abuse of the process of the court, and costs; and
F (3) the plaintiff's application dated 4 September 1990 for leave to discontinue the action against the fifth defendant and for costs of the application.

G *Background of case*

The plaintiff instituted this action for recovery of various sums totalling \$1,334,171.14, and interest at diverse rates on various sums against the first defendant as principal and against the other six defendants as guarantors of whom the fifth defendant was one. There is also a claim for 'costs on a solicitor and client basis'.

- H The fifth defendant delivered a defence dated 20 April 1989.

On 4 May 1989 a judgment in default of appearance was entered against the first and seventh defendants. The default judgment also included 'costs on a solicitor and client basis to be taxed'.

- I The plaintiff then took out the application dated 8 June 1989 mentioned above for striking out the fifth defendant's defence and for entry of final judgment and costs.

By 15 August 1989 the judgment debt and the costs as awarded were fully settled by the other defendants. On 14 October 1989 this action was discontinued as against all the other defendants except the fifth defendant.

On 22 March 1990 the fifth defendant filed application (2) above for dismissal of the action for want of prosecution or as being vexatious or an abuse of the process of the court and costs.

On 4 September 1990 the plaintiff filed application (3) above for leave to discontinue this action and for costs of the application.

Plaintiff's summons dated 8 June 1989 for striking out the defence and for judgment

As the claim of the plaintiff had not been settled or liquidated by 8 June 1989, the plaintiff was, at least procedurally, justified in taking out on that date the application against the fifth defendant for striking out the defence and for judgment.

For the fifth defendant it was submitted that there had been delay in effecting service of the summons on the fifth defendant through his advocate which was served on 13 March 1990. In this regard, the explanation of the plaintiff was that the summons was first brought up for hearing on 13 September 1989. Service had not by then been effected for the reason that negotiations for settlement between the plaintiff and some other defendants were going on. On 13 September 1989 the summons was adjourned to a date to be fixed. The next hearing date fixed by the court registry (with which the fixing of dates lay) was 14 June 1990. I consider the explanation reasonable. It is also, to my understanding, the usual practice to effect service after a date for hearing has been fixed: ie in the context of the present case, to effect service on or after 9 March 1990, the date of the notice of rescheduled hearing (see paras 3 and 4 of the 'Notes of submission' dated 9 May 1991 for the fifth defendant).

Counsel for the fifth defendant cited *Lum See On v Chan Kit Yong*¹ as a reason in support of his contention on the delay in hearing the summons dated 8 June 1989 heard on 14 June 1990 ie more than one year after its issue. In *Lum See On*'s case¹ (a tenancy case) the defendant, who obtained letters of administration to a deceased tenant's estate prior to the commencement of the action, claimed protection of the Control of the Rent Ordinance [1953]. By the date of the trial of the action, the grant of the letters of administration to the defendant had been revoked. It was held that the relevant date for determining the rights of the parties was the date of the hearing and that since on that date the defendant had ceased to be the legal personal representative of the deceased, she could not claim protection of the said Ordinance. In the present case before me, the plaintiff has no desire to proceed with the summons dated 8 June 1989 for the sake of obtaining a judgment for the sum claimed; the plaintiff, however, as I have said earlier, was justified in taking out the summons on that date. I find *Lum See On*'s case¹ of no assistance in the circumstances.

As I have just stated, the plaintiff has no wish to proceed with the summons for striking out the defence and for judgment. This is due to the fact that its claim had been fully settled by some defendants other than the fifth defendant. Through its counsel, the plaintiff wrote on 13 September 1989 to inquire if the fifth defendant would agree to have the action discontinued with each party paying its own costs. The fifth defendant was agreeable but only on payment of \$5,000 costs (see paras 8 and 9 of the

A affidavit of John Ko affirmed on 16 July 1990 and the exhibits referred to therein). The main obstacle then, as reflected by the correspondence, was the question of costs.

B Counsel for the fifth defendant also dwelt on the strength of the defence case. I am not inclined to go into the merits. By reason of settlement of the claim, the plaintiff no longer wishes to proceed with the summons dated 8 June 1989 with the view of obtaining judgment as prayed. Moreover, there are further developments: the plaintiff is seeking leave to discontinue the action, and the fifth defendant is applying to have the action dismissed. In the circumstances, it would be futile to decide whether judgment for the sum claimed is to be entered, and would, in my opinion, be a waste of time to try the application on its merits merely for the sake of the question of costs.

C In *JT Stratford & Son Ltd v Lindley & Ors (No 2)*,² on which I shall say more in a moment, the Court of Appeal refused to go into the merits of the case for the purpose of deciding the question of costs despite the existence of an earlier order of 'costs in the cause' granted by the House of Lords. D The present action before me is, to my mind, a stronger case for declining to deal with the merits since there is no prior order of costs as in *JT Stratford's* case² above-mentioned.

E For the above reasons and having regard to my decision below on the other two applications, I consider it fair and just to strike out the application dated 8 June 1989 without deciding on its merits. I so order. In the exercise of the discretion of the court, I also order that there be no order as to costs.

The fifth defendant's application dated 21 March 1990 for dismissal of action and the plaintiff's application dated 4 September 1990 for leave to discontinue action

F I propose to deal with the two applications together. The case of *JT Stratford & Son Ltd v Lindley & Ors (No 2)*² is, to my mind, illuminating and of assistance. Apart from the elements of the restoration of an interlocutory injunction by the House of Lords and the ordering of costs to be costs in the cause, the said case contains features similar to our present G action. That case went to sleep for more than three and a half years after the pleadings were closed. Then the defendant applied to dismiss the action for want of prosecution under O 25 r 1(4) of the English [Rules of the Supreme Court 1965], and the plaintiff applied for leave to discontinue the action under O 21 r 3(1) of the English [Rules], each party asking for costs to be H paid by the other side. (The provisions of the said orders and rules are similar to those contained in our orders and rules of the same numbers). Neither side wished to continue the action, and neither side wanted to pay the costs thus far incurred. The Court of Appeal, in upholding the decisions of the master and the judge, granted leave to discontinue the action and ordered each party to pay its own costs.

I In his judgment Lord Denning MR said at p 1553 E-F:

It is plain that neither side wishes to go on with the action so as to get his own costs. But neither side wishes to pay the other side's costs. Each will fight rather than pay the other side's costs. So what is to be done? Is this case to go on simply about costs? I think not.

At a later stage, he continued at p 1554 B-D:

Mr Campbell has urged us to award the plaintiffs the costs because they would very probably have won if the action had been tried out on its merits. I decline to go into that question. We cannot try the action at this stage. I put aside the respective merits of the dispute... I think that we should not dismiss the action under O 25 r 1(4) for want of prosecution. I think the court should give the plaintiffs leave under O 21 r 3 to discontinue. That rule gives the court a wide discretion as to costs... Finding that neither side wishes to go on with this action, I think the master and the judge exercised their discretion wisely in giving leave to discontinue on the footing that each side is to bear its own costs. The order should be that the action be discontinued, each side paying its own costs...

Having considered arguments by counsel for both sides and on the facts and circumstances of our instant case, the proper order, in my judgment, and which I now make, is to give leave to the plaintiff for the action to be discontinued and, in the exercise of the discretion of the court under O 21 r 3, order that each party pays its own costs.

One further matter I would deal with. In the course of the submissions, it was contended for the fifth defendant to the effect that affidavits filed on behalf of the plaintiff and not expressly or specifically mentioned as relating to the two summonses dated 21 March 1990 and 4 September 1990 should not be used in considering any of the two summonses. I wish to say this: I have not dismissed the action under the summons dated 21 March 1990 but have given leave under O 21 r 3 to the plaintiff to discontinue the action. If I had in any way been influenced by any of the affidavit evidence complained of, it was purely on the question of costs. In *Computer Machinery Co Ltd v Drescher & Ors*,³ there was no trial, and on the issue of costs it was held that there was no rule which prevented evidence relevant to costs from being considered though it had not already been admitted, and that it was a matter for the court in its unfettered discretion to admit any evidence which it considered relevant (at p 158). In our instant case, the affidavit evidence was filed in court except that no notice of intention to use thereof was given.

Order accordingly.

Reported by Wong Kian Kheong

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